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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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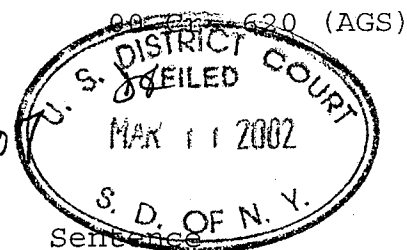
3 UNITED STATES OF AMERICA,

4 v.

5 IRVING STITSKY,

6 Defendant.

7 -----X



8 New York, N.Y.  
9 January 7, 2002  
10 11:45 a.m.

10 Before:

11 HON. ALLEN G. SCHWARTZ,

12 District Judge

13 APPEARANCES

14 MARY JO WHITE  
15 United States Attorney for the  
16 Southern District of New York

17 JAY MUSOFF  
18 Assistant United States Attorney

19 ROGER BENNET ADLER  
20 Attorney for Defendant

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3 UNITED STATES OF AMERICA,

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00 Cr. 620 (AGS)

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Sentence

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ROGER BENNET ADLER

18 Attorney for Defendant

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names  
3 for the record.

4 MR. MUSOFF: Good morning. Jay Musoff for the  
5 government.

6 MR. ADLER: Good morning, your Honor. Roger Bennet  
7 Adler, 225 Broadway, New York, New York, for defendant Irving  
8 Stitsky, present before the court.

9 THE COURT: Mr. Adler, are you and your client  
10 prepared for sentence today?

11 MR. ADLER: We are, your Honor.

12 THE COURT: You and Mr. Stitsky have each read the  
13 presentence report, correct?

14 MR. ADLER: We have.

15 THE COURT: You have either noted or had the  
16 opportunity to note any comment or objection you had to the  
17 contents of the report?

18 MR. ADLER: Yes.

19 THE COURT: I also have received from you, Mr. Adler,  
20 your submission dated December 20, 2001, including the  
21 Exhibits A through D, I have the government's letter,  
22 Mr. Musoff's letter, that's dated January 2, 2002, and I also  
23 have your letter dated January 2, 2002 and the letter that you  
24 faxed to me Friday dated January 4, 2002. I want you to know  
25 that I have read all of those materials and all the exhibits

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1 annexed to them.

2 Do you wish to be heard on behalf of Mr. Stitsky?

3 MR. ADLER: I do.

4 THE COURT: Would you please approach the microphone.

5 MR. ADLER: Thank you, your Honor. If it please the  
6 court, in the autumn of 1995, efforts which began in the  
7 summer of that year to initiate a business venture with Paul  
8 Burton, which is to say the opening of an OSJ branch of  
9 Monitor Securities, began to move forward.

10 We are here today because during the life of Monitor  
11 Securities and DMN, bribes were paid, stocks were promoted,  
12 and investors were victimized by those brokerage concerns.  
13 The indictment and paragraph 130, on, I believe, page 22 of  
14 the PSI report confirms that the primary role that my client,  
15 Irving Stitsky, played in connection with those activities was  
16 in response to the need for stockbrokers to work at Monitor,  
17 to get the word out, and, indeed, he recruited pursuant to  
18 that agreement and understanding a number of brokers, two of  
19 whom are significant for sentencing purposes here today. They  
20 are Mark Burton, not to be confused with Paul Burton, and Mark  
21 Burton's partner, colleague, Ken Fuina. My comments will be  
22 limited as to them. I am mindful that the court will deal  
23 with that situation at another time and, most significantly,  
24 under different circumstances.

25 However, during the period of time that Mark Burton

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1 and Ken Fuina, who got their jobs on the recommendation of  
2 Irving Stitsky, became involved in representing a client named  
3 Gary Fettman, and during the period of time that's relevant to  
4 the sentence your Honor will impose this morning, unbeknownst  
5 to Gary Fettman, the brokerage house and Mark Burton and Ken  
6 Fuina received various bribes, various inducements, which were  
7 not disclosed insofar as they relate to two entities that are  
8 the subject of sentencing here today, International Nursing,  
9 which was involved in the summer of 1995, more than six years  
10 ago, and another entity called Beach Port.

11 Confining myself to the terms of the plea agreement  
12 which permit me to call facts to your attention but go no  
13 further as an advocate for Mr. Stitsky, let me simply say that  
14 the PSI report represents to your Honor, and the chart is  
15 found at paragraph 125, at pages 20 to 21 of the PSI report,  
16 that Mr. Stitsky received approximately \$57,000 in connection  
17 with these activities at Monitor over a period of several  
18 months, and the stipulated range of relevant conduct as  
19 presented to the court is between 800,000 and 1,500,000.

20 In terms of the figures for both Ken Fuina and Mark  
21 Burton, they are significantly lower, and I call the court's  
22 attention to that in the PSI report. I urge the court to  
23 consider the figures in determining an appropriate guideline  
24 range.

25 The second topic I would like to speak to, the second

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1 and final, deals with extraordinary family circumstances.  
2 With the court's permission, the court is aware the audience  
3 in this courtroom is filled today with family members of the  
4 Stitsky family. There is one individual whom I would, if the  
5 court will permit him to speak briefly to this issue because I  
6 would like to speak about it, but I think that as the famous  
7 saying went, "from the mouths of babes," Irving's eldest son,  
8 Jarrett Stitsky, who is here during intercession between the  
9 fall and spring semesters from the University of Miami where  
10 he earned an academic scholarship following his graduation  
11 from Jericho High School in June of 2001, I believe can speak  
12 most poignantly to the circumstances.

13 THE COURT: Mr. Adler, let me interrupt you to say  
14 that I have read his letter and I have read all of the  
15 letters, and the letters written by the children are, to put  
16 it mildly, poignant and significant, and I sympathize with  
17 them, but I don't intend to hear the children speak today,  
18 including Jarrett. I expect that you will speak and say  
19 whatever there is to be said with regard to this issue.

20 MR. ADLER: Yes, sir.

21 As the court is aware from the probation report that  
22 Mr. Steele has prepared, the parties were divorced but in an  
23 unusual situation, and there are many unusual circumstances  
24 that exist in the affairs of men and women in our society  
25 today, they live together in the Muttontown residence, which

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1 is to say, Andrea and Irving and the children. And Jarrett,  
2 who is here today, up until he left for school in August to  
3 attend the University of Miami, lived in the home until that  
4 time. He is back there now during intercession.

5 Irving resided in the home and I think can best be  
6 described, as the letters from not merely the defendant's  
7 children but, I hate to use the word strangers, but I will  
8 call them strangers in the sense that teachers, principals,  
9 others who interacted with Mr. Stitsky for years in terms of  
10 him being the primary caregiver, the primary individual within  
11 the Stitsky family, who ensured that the tasks of growing up  
12 were approached in a focused way as best as he could.

13 The reason that I had asked the court to permit  
14 Jarrett to speak was not to make the job of judging more  
15 difficult than it already is. I have no doubt, knowing you  
16 professionally as I do, that this has got to be the worst part  
17 of the job, and I don't mean that in a flippant way. But  
18 particularly of late, and when I use the term "particularly of  
19 late," I mean particularly in the last several months, in the  
20 fall of 2001, and particularly into the holiday period, the  
21 inability of Andrea Stitsky to cope with her responsibilities,  
22 manifested by an apparent alcohol, an apparent drug problem,  
23 she is, as I understand it, currently being interviewed today  
24 by an arm of the court in Nassau County called TASC, whose  
25 function is to advise the court about possible drug abuse

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1 programs, particularly for people who can benefit from forms  
2 of rehabilitation in the areas to which I spoke.

3 My purpose in raising this is not to shift focus from  
4 Irving to something else. This is not a variation on the dog  
5 ate the homework type of an excuse. It is simply to call to  
6 the court's attention an unusual circumstance that exists and  
7 has existed and has accelerated to exist over the last several  
8 months, and particularly the last several weeks, that the  
9 children have been confronted with that goes beyond what I  
10 will call the ordinary family circumstances that a family is  
11 required to cope with when a defendant is convicted of a crime  
12 and faces a term of incarceration.

13 One of the troubles that I have with the somewhat  
14 clinical approach that the Probation Department has taken is  
15 that it is detached from, to the point that it has not  
16 consisted of interviews with the children and a development of  
17 the facts that I think put meat on the proverbial bones for  
18 the court to assess the nature and circumstances of why this  
19 is extraordinary, meaning not ordinary.

20 The two remaining children who live at home, Eliza  
21 who is age 10 -- Eliza, can you stand up for a minute? Thank  
22 you. Brett, are you here? Jarrett, are you here? Thank  
23 you -- have lived under these difficult circumstances. I feel  
24 it is important for the court to factor them in in an  
25 appropriate way.

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1 I am not seeking to trivialize the offense conduct.  
2 I am not seeking to trivialize or divert attention away from  
3 the court's function here today. But as I noted in my final  
4 letter to the court on January 4, referencing the court to a  
5 recent Law Review article that your colleague John Martin  
6 published in the Brooklyn Law Review, The Need for Measured  
7 Departures under Appropriate Circumstances, whether it's a  
8 significant departure or something more in the nip-and-tuck  
9 departure, I think it is called for in this case.

10 I call the court's attention, and I am now proceeding  
11 to the final portion of my presentation, to the fact that the  
12 Probation report tells us that the combined earnings, illicit  
13 earnings of Mark Burton and Ken Fuina are in the range of  
14 \$70,000 to \$120,000. I call the court's attention to the fact  
15 that if the court were to add to that figure the moneys that  
16 Mr. Stitsky earned during the period of time that we are  
17 talking about, the court would be at the guideline range of  
18 less than 350,000, but more than 200,000. It would be a step  
19 up of eight guideline levels in the 2F1.1 total for a net  
20 offense level of 13 and a guideline range of not less than 12  
21 months nor more than 18 months.

22 I urge the court to temper justice with mercy in  
23 sentencing my client Irving Stitsky here today.

24 I know Mr. Stitsky wanted to address the court at the  
25 appropriate time.

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1 THE COURT: Mr. Stitsky, do you wish to be heard?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You may also approach the microphone if  
4 you wish.

5 THE DEFENDANT: I would like to start off by making a  
6 number of an apologies. First to the court for the time  
7 needed to conclude this case. Next to the government for the  
8 expenses imposed on them in order to complete the case. And  
9 last but not least to my family, my loved ones, who depended  
10 on me and I let down.

11 The fact that I went into a business venture with  
12 Jeff Pokross and his associates and received a total of  
13 \$57,000 over a period of a few months while I waited for my  
14 license to clear, so I hoped run a branch office for them, and  
15 then later realized this money was for the brokers I referred  
16 who bought and sold their stocks. It was wrong and I am sorry  
17 for that. After my license didn't clear, I went on to a  
18 different business. Today I realize that no matter how much  
19 money is involved, it's not worth the sacrifices that come  
20 with it.

21 To jeopardize my children and their well-being, to  
22 create this mental anguish for my parents and my sisters, I  
23 can't apologize enough. I have not only exposed myself to a  
24 sentence imposed by this court, but I have sentenced them as  
25 well, and for this I am truly sorry.

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1           Your Honor, my children are my life and they depend  
2 on me day to day, almost hour to hour, and I have clearly let  
3 them down. During these past six months while incarcerated at  
4 MDC, I have helplessly witnessed my family fall apart. I  
5 truly believe that if I was there, even under home  
6 confinement, I could have prevented a lot of what has  
7 happened. I have seen my mother age and become ill due to the  
8 stress caused by an investment into a retail optical business  
9 where I worked six to seven days a week. My mother took a  
10 loan to help me and, unfortunately, misrepresentations of  
11 financials were made and a tremendous amount of money was  
12 lost. The way I handled myself in that situation was wrong,  
13 and for that I am sorry.

14           I have witnessed my former wife Andrea completely  
15 self-destruct and deteriorate by her abusive use of alcohol  
16 and drugs, her desire to patronize bars and local Long Island  
17 singles hangouts and be a part of a whole new social life.  
18 This has had a negative impact on her responsibilities to our  
19 children, as well as her daily responsibilities of a  
20 homemaker. She's tried to work at two different jobs and has  
21 failed and been let go. My children have visited me at MDC  
22 and cried to me that they need me not just because they miss  
23 their father, because they need parental guidance and some  
24 form of discipline, someone they can count on during troubled  
25 times.

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1           My 20-year-old daughter, Shara, who is on her way to  
2 recovery from abusive drug use by going to NA and AA has had a  
3 terrible time since my incarceration. Her relationship with  
4 her mother has almost become a competitive environment. Her  
5 mother's desire to socialize with her daughter's friends to  
6 the point of dating some of her own daughter's ex-boyfriends  
7 has sent my daughter into a rebellious frizzy which has caused  
8 her to face the courts of Nassau County and be ordered into a  
9 rehabilitation program.

10           My 10-year-old daughter Eliza finds herself in an  
11 awkward position. She's not sure if she's the mom or the  
12 child. If she's not nursing her mother through one of her  
13 episodes, she's lying awake worried if or even when her mother  
14 is coming home from a night out. These frequent escapades  
15 have forced her own 16-year-old son to act as her daughter's  
16 parent helping with homework and getting her off to school in  
17 the morning. This behavior has caused her to miss an  
18 inordinate amount of school and has jeopardized her education.

19           My 16-year-old son Brett is a junior in high school  
20 who has become completely withdrawn since my incarceration.  
21 He went from a B plus student to barely passing. And finally,  
22 he is finding his teenage time disappearing because he is  
23 looking after his sister or mother and worried about them  
24 both, all of which I believe will have a dramatic impact on  
25 his future and growth as a young man.

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1           My 18-year-old son Jarrett is a freshman at the  
2 University of Miami on an academic scholarship. He has  
3 recently suffered a near fatal accident which has hospitalized  
4 him for two weeks and he is currently requiring extensive  
5 rehabilitation. Due to his mother's recent neglect, he has  
6 not been to his required follow-up visits, which if I was  
7 there I know he would be looked after. He just recently told  
8 me he was taking a leave of absence from school so he can help  
9 at home. This alone has broken my heart since I know how he  
10 has worked to get to college.

11           Your Honor, my time at MDC and the recent events of  
12 September 11 have allowed me to assess life from a completely  
13 different perspective. Certain things that I took for granted  
14 should and will be looked at a lot closer and much more  
15 carefully and appreciated a lot more, kind of a wake-up call  
16 to see what is important and what is really not.

17           It made me realize that the postulate "crime does not  
18 pay" says a lot, and the true meaning means more to me than  
19 anything. I have learned that your freedom and ability to  
20 make choices regardless of your financial wherewithal, be it  
21 rich or poor, is truly a most valuable commodity a person  
22 possesses. To be with your family in the privacy of your own  
23 home, having dinner together, able to discuss the events of  
24 the day, just being there to enjoy the good and help with the  
25 bad, moments like when you authorized me yourself to travel

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1 with my boy's high school basketball team to a tournament in  
2 Florida, those are the moments treasured the most. These are  
3 the times and moments that are worth more than any amount of  
4 money you can ever make.

5 This time at MDC has also extended me the opportunity  
6 to reflect upon my future. How can I afford to support my  
7 children in a lawful manner and hope to make a positive  
8 difference? I would like to continue my education so I may  
9 work with teenage children and possibly help guide them from  
10 right and wrong and maybe just, maybe can save one child from  
11 making the terrible mistakes I have.

12 So, your Honor, I am asking you here today, no, sir,  
13 I am begging you, that you will impose the lightest possible  
14 sentence based on all the circumstances so I may complete my  
15 time and get back to my children and start this new life.

16 Thank you for your time.

17 THE COURT: Mr. Musoff, anything you wish to say?

18 MR. MUSOFF: Yes, your Honor.

19 Let me first address Mr. Adler's comments briefly  
20 regarding the loss amount.

21 THE COURT: Why don't you also go to the microphone  
22 so everyone can hear you.

23 MR. MUSOFF: Yes, your Honor.

24 Your Honor, first turning to Mr. Adler's comments  
25 regarding the loss amount, I don't think it's at all disputed

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1 that the stipulated loss amount in this case is between  
2 \$800,000 and \$1.5 million, and it's clear that that number is  
3 not the sum total of the bribes paid to either Mr. Stitsky or  
4 the brokers he has recruited but that is the value of the  
5 benefit conferred upon DMN Capital and its partners for the  
6 securities transactions that those brokers were recruited to  
7 engage in.

8           It needs to be clear, your Honor, that Mr. Stitsky  
9 had come from Stratton Oakmont, and I don't believe it's  
10 disputed that securities fraud was rampant. He was later  
11 barred from the industry based on his conduct at Stratton  
12 Oakmont and then he and his partner Paul Burton were tasked  
13 with recruiting these sorts of brokers, primarily from  
14 Stratton Oakmont, to perpetrate securities fraud at a new  
15 firm, Monitor Investment and Associates. So Monitor was  
16 created for the sole purpose of engaging in securities fraud.

17           After his brief association with Monitor, I don't  
18 believe it is disputed that he continued to engage in  
19 securities fraud, and he was convicted of that conduct before  
20 the Eastern District which he awaits sentencing on.

21           So unless your Honor has any questions regarding how  
22 the loss amount was calculated, and I believe it's stipulated,  
23 the fact that he personally received an amount less doesn't  
24 factor at all into the offense guidelines calculation. But if  
25 your Honor sees fit to view it in terms of where within the

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1 sentencing range, the government does want to point out that  
2 Mr. Stitsky enjoyed a position in the Monitor firm above that  
3 of his brokers. So he was in relationship with the DMN  
4 Capital partners and he, in turn, recruited these brokers. To  
5 the extent the brokers have a limited role, that is because it  
6 was Mr. Stitsky who stood as the one who had the relation with  
7 DMN Capital and he in turn was the one who was organizing  
8 Monitor along the same fraudulent lines as Stratton Oakmont.

9           Turning to what I believe is the main argument today,  
10 which is whether a downward departure based on family  
11 circumstances is appropriate, as it is clear, the disruption  
12 of a defendant's family life is an obvious and an unavoidable  
13 consequence of incarceration. The fact that a defendant's  
14 family life will be disrupted and that truly innocent victims,  
15 meaning the defendant's children, may be affected alone is not  
16 grounds for a downward departure. While I don't believe the  
17 government has been bottom feeding, as I believe was  
18 characterized in the most recent letter to the court, I  
19 believe it is clear that even single parents whose children  
20 are placed in foster care repeatedly courts have found that is  
21 not an extraordinary family circumstance. Here it's a  
22 two-parent household and the children certainly are not being  
23 placed in foster care.

24           The other thing that the government pointed out in  
25 its letters, these are not incredibly young children. Granted

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1 the youngest is 10 years old, but the others are either in  
2 high school or the oldest are 18 and 20 years old. They are  
3 in college. So it's a situation of extremely young children  
4 left at home.

5 I think the thrust of the government's response truly  
6 deals with the fact that this defendant's family is fortunate  
7 enough to have the support of, as they call it themselves, a  
8 tight-knit and supportive family. This is a situation where  
9 both sets of grandparents are involved. The defendant's  
10 wife's parents, as well as the defendant's mother, and I  
11 believe his father has passed away, his stepfather are all  
12 enormously supportive, supportive both emotionally and, as set  
13 forth in the PSI, they have given hundreds of thousands of  
14 dollars over the year to support the defendant's family.

15 In addition, closer to home, the defendant also has  
16 two sisters who are also enormously supportive, and it appears  
17 that the defendant's children's aunts and uncles stand ready  
18 and willing to continue to provide that support to their  
19 nieces and nephews and they, too, have provided tens if not  
20 hundreds of thousands of dollars to this defendant's family.

21 I think it needs to be noted, your Honor, that the  
22 defendant's family does enjoy a lifestyle quite unusual to  
23 many other defendant's families. As pointed out in the PSI, I  
24 believe at paragraph 177, the defendant lives in a six-bedroom  
25 home on three acres in an affluent section of Long Island.

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1 They have a three-car garage, tennis court and swimming pool.  
2 This lifestyle continues to be enjoyed by them. They suffer  
3 obviously somewhat because the defendant is not able to  
4 provide any financial support, but it appears they continue to  
5 live in this home and enjoy clearly an above-average  
6 lifestyle. Maybe not the lifestyle they were accustomed to  
7 when the defendant was making \$2 million when he was working  
8 at Stratton Oakmont, but as we all know, Stratton Oakmont was  
9 engaged in securities fraud. I think it needs to be pointed  
10 out that this defendant over the years has not provided  
11 legitimate financial support to his family, he has engaged in  
12 securities fraud, and by that means he has provided financial  
13 support to his family.

14 Finally, your Honor, when the defendant appeared to  
15 have engaged in a line of business other than securities  
16 fraud, when he entered into a business arrangement with his  
17 mother involving Sterling Optical stores, that too was tinged  
18 by criminal activity.

19 As your Honor knows, this summer the defendant was  
20 remanded into custody because the defendant physically  
21 threatened the individual who had loaned money for the  
22 purchase of these stores. This was supposed to be the  
23 defendant turning a new leaf, in a legitimate business.  
24 Instead, the defendant brings along two men to threaten this  
25 person with physical injury if he continued in pursuing what

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1 was a legitimate business loan to the defendant. Throughout,  
2 this defendant has engaged in criminal activity such as to  
3 support the family's lifestyle.

4 The other point I want to turn to is something that  
5 has been commented on much by Mr. Adler in his submissions, is  
6 that while it appears that the defendant's wife does suffer  
7 from substance abuse problems, the defendant too has his own  
8 substance abuse problems. I am not saying that this somehow  
9 makes him a better or worse father. The letters of support  
10 speak for themselves. But this court should take notice that  
11 the defendant has his own set of substance abuse problems,  
12 that he himself has been abusing drugs on and off for the past  
13 25 years, including cocaine, Quaaludes, Ecstasy and alcohol.  
14 The defendant has never completed a rehabilitation program and  
15 it's unclear what sort of treatment and what his current  
16 status is with respect to that substance abuse and how that  
17 would affect his parental duties.

18 So, in sum, all these cases, your Honor, with respect  
19 to family circumstances obviously portray families disrupted  
20 and suffering, for what in this case the children's father has  
21 done and brought upon himself. But in this case, your Honor,  
22 these children enjoy a supportive family that provides  
23 emotional and financial support, and this case, unlike even  
24 cases where single parents are incarcerated and their children  
25 are left as wards of the state, these children will not suffer

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1 a fate even close to that. For those reasons, your Honor,  
2 this is not an extraordinary case that warrants any sort of  
3 downward departure.

4 THE COURT: Let me ask you a question, Mr. Musoff.

5 You have asked the court to set a date within 90 days  
6 after sentencing for purposes of setting restitution in this  
7 case, correct?

8 MR. MUSOFF: Yes, your Honor.

9 THE COURT: How far advanced are you in the exercise  
10 of putting together your restitution request?

11 MR. MUSOFF: I have spoken to my colleagues who are  
12 also involved in this case with the other codefendants and my  
13 understanding is that since the terrorist attacks in the World  
14 Trade Center, the SEC documents with respect to this case were  
15 destroyed. With respect to the restitution portion, I  
16 understand that they are putting it together through alternate  
17 means, and the government would request, and I have spoken to  
18 Mr. Adler, that a date be set some 45 or 60 days from today.  
19 I expect to have a number which I would like to discuss with  
20 Mr. Adler two weeks before the sentencing date, so hopefully,  
21 your Honor, Mr. Adler and the government can discuss what is  
22 the appropriate and accurate restitution amount and we can  
23 come to the court prepared at that time with hopefully an  
24 undisputed amount. The government would respectfully request  
25 a date set 60 days from now.

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1 THE COURT: I understand.

2 Let me ask you this. Have you done anything with  
3 regard to listing how many victims there were?

4 MR. MUSOFF: Yes, your Honor. It's my understanding,  
5 because we have limited for purposes of this plea agreement  
6 the victims, the victims are the customers of the two brokers  
7 that Mr. Adler mentioned, Mark Burton and Ken Fuina. It's my  
8 understanding there were only two primary customers and one  
9 main customer and that that customer's losses were  
10 approximately \$800,000. So it's not a multitude of victims.  
11 We are trying to assess more the value of the loss than the  
12 number of victims.

13 THE COURT: Thank you.

14 Mr. Adler, you were on your feet. Did you want to  
15 say something?

16 MR. ADLER: Just briefly and simply factually by way  
17 of clarification.

18 Irving Stitsky was not an officer or had any equity  
19 interest in Monitor or any of those companies. The brokers  
20 that were recruited, as the indictment alleged and indeed as  
21 the allocution confirmed, went to work and received their  
22 instructions and made their decisions concerning what they did  
23 and why they did it and how they conformed to SEC regulations  
24 without the guiding hands of Irving Stitsky.

25 Accordingly, to the extent, particularly where the

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1 one individual who has been identified, Mr. Fettman, became a  
2 customer of Burton and Fuina afterwards, the court has already  
3 heard, and indeed the probation report has reported on how  
4 Burton and Fuina's loss total is computed, or gain total, I  
5 guess I should say, because the basis is bribery, I ask the  
6 court to keep that in mind particularly where the Probation  
7 Department talks about the fairness and equity.

8           Lastly, in terms of lifestyle and extraordinary  
9 family circumstances, the house that you have heard about was  
10 contemplated to be sold. Attempts have been made to sell it  
11 to get Florence Nathan, who is Irving's mom, to recoup the  
12 moneys and to take her off the mortgage. The house, as I  
13 understand, is currently in foreclosure and attempts have been  
14 made, none of it has been helpful because of the downturn in  
15 the economy result of the events of September 11, but this  
16 house will probably end up, at best, as a break-even  
17 proposition and the family will only know, and a lot of this  
18 has been delayed, as I understand it, in order to see what is  
19 going to happen in terms of the sentencing.

20           In terms of Sterling Optical, I think it's a tragic  
21 situation that the perceptions were that the seller of the  
22 stores that took back notes had been less than candid with  
23 regard to credit card receipts and the like. It clearly  
24 was -- and that's why it was prosecuted as a 1001 violation  
25 and not in any other significant way. It was recognized as a

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## Sentence

1 spontaneous and unfortunate response to the perception that  
2 his mom was being ripped off and not for other continuation of  
3 any form of criminality, although he has accepted  
4 responsibility for his role completely in that situation and  
5 will be sentenced before Judge Seidler because of it.

6           However, I would point out this is a defendant who  
7 understands the work ethic. He was working some 60-plus hours  
8 a week to learn the business. I know he was learning the  
9 business. He was prepared and indeed that manifested a  
10 recognition that the securities field was certainly a field  
11 that was no longer appropriate to have any involvement in.

12           To the extent that the court imposes a sentence today  
13 and reserves on the issue of restitution for the reasons the  
14 government has made clear, just to comment on that, I  
15 indicated to Mr. Musoff it might be most helpful for the court  
16 if the government were able to make 45 days as an  
17 approximation. If they will get me those figures, I will  
18 confer with --

19           THE COURT: Mr. Musoff indicates that's what he has  
20 indicated.

21           MR. ADLER: I want you to know we have spoken about  
22 it, and in order to make the job less adversarial and more  
23 collegial, if we can agree, we will. If we can agree in part,  
24 we will. We will come back at some other time for that  
25 housekeeping portion of the case.

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## Sentence

1 I do believe that the circumstances here are  
2 extraordinary. Some people when they think about departures  
3 believe that a lawyer is asking the court to impose a  
4 noncustodial sentence. That's not what this approach is  
5 about. I think that there is a family and the family is doing  
6 what it can under difficult circumstances. I am simply saying  
7 that a measured departure, which is not insignificant, that's  
8 why I called the court's attention to the combined loss totals  
9 or the combined gain totals because I think that is a figure  
10 that the court can rely upon should it be so inclined, could  
11 point the way towards tempering justice with mercy. It sends  
12 the message that conduct of this kind will not be tolerated  
13 and victims will be protected, at the same time it also sends  
14 a message that we cannot turn our backs on our children who  
15 are the next generation. Again, I ask the court to temper  
16 justice with mercy.

17 THE COURT: Any legal reason why sentence should not  
18 now be imposed?

19 MR. ADLER: No, sir.

20 THE COURT: Mr. Musoff?

21 MR. MUSOFF: No, your Honor.

22 THE COURT: The defendant may remain seated.

23 The defendant, Irving Stitsky, has pled guilty  
24 pursuant to a written plea agreement to Count 5 and Count 7 of  
25 the indictment to the crimes of conspiracy to commit

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24

## Sentence

1 securities fraud, wire fraud, and to use interstate facilities  
2 to commit commercial bribery, both of which crimes are  
3 punishable under 18 United States Code, Section 371, and they  
4 are Class D felonies.

5           These two counts under the sentencing guidelines are  
6 grouped, and the base offense level for these crimes as set  
7 forth in 2F1.1(a) of the guidelines is 6, to which there are  
8 added 11 levels as a result of the fact that the value of the  
9 improper benefit to be conferred in return for the bribes  
10 received by Mr. Stitsky was more than \$800,000 but less than  
11 \$1.5 million. The offense level is also increased by two  
12 levels because these crimes involved more than minimal  
13 planning. There was more than one victim.

14           The result of these increases is to place the  
15 adjusted offense level at 19. Mr. Stitsky has accepted  
16 responsibility for his crimes and, therefore, is entitled to a  
17 three-level reduction, which places the total offense level at  
18 16.

19           He is in Criminal History Category I, a most  
20 favorable Criminal History Category. As a result, his  
21 guideline imprisonment range is 21 months to 27 months; his  
22 guideline supervised release range is two to three years;  
23 probation is not authorized under the sentencing guidelines at  
24 these levels; his guideline fine range is \$5,000 to \$50,000;  
25 and there is a mandatory special assessment of \$100 per count

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## Sentence

1 for a total of \$200.

2 The defendant has noted objections to the presentence  
3 report and these are adequately addressed at page 31 of the  
4 presentence report. The defendant has submitted substantial  
5 materials from his family, friends, others, with regard to his  
6 character, his involvement with his children, the difficulties  
7 that his family experiences, the need to have the defendant  
8 with his children. It's a complicated set of circumstances  
9 here.

10 The substance of this case, going back to the case  
11 itself, is that the defendant participated in what are called  
12 pump-and-dump schemes as a registered representative, and he  
13 also recruited certain stockbrokers to the firm, which has  
14 been mentioned, Monitor, from November 1995 through March of  
15 1996, who would receive secret, undisclosed bribes for  
16 recommending certain securities to their retail clients, and  
17 Monitor was most recently controlled by DMN Capital which paid  
18 the bribes to the defendant and others.

19 The facts of this case I think ought to be more  
20 specifically laid out on the record here and so I am going to  
21 refer to what has been provided in the presentence report and  
22 in the government's letter, Mr. Musoff's letter dated January  
23 2 and, in part, in the submissions made by Mr. Adler on behalf  
24 of Mr. Stitsky.

25 In substance, going back to 1995, DMN Capital, which

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## Sentence

1 was a financial advisory firm that was corrupt -- it was  
2 founded as a joint venture of the five La Cosa Nostra crime  
3 families in New York -- orchestrated a series of stock  
4 manipulation schemes that fraudulently induced investors at  
5 numerous brokerage firms into buying certain securities by, as  
6 I have described, among other fraudulent means, paying secret  
7 bribes to stockbrokers to cause their retail customers to buy  
8 and hold certain securities. In connection with its  
9 fraudulent scheme, DMN Capital controlled various brokerage  
10 firms, including Monitor Investment Group, the firm that's  
11 being mentioned here.

12 The DMN firm recruited certain stockbrokers to work  
13 at Monitor through an agreement with Mr. Stitsky and his  
14 partner Mr. Burton, Paul Burton, whereby Stitsky and Burton  
15 arranged for several licensed and unlicensed brokers to work  
16 at Monitor and receive secret, undisclosed bribes for what the  
17 government calls aggressively pushing certain securities. I  
18 don't have to go through the names of the companies.

19 Mr. Stitsky recruited many of these brokers from  
20 another fraudulent place, Stratton Oakmont, where fraudulent  
21 sales practices had been used. Mr. Stitsky from August 1990  
22 to July 1995 had been employed by Stratton Oakmont, which was  
23 a boiler room operation, and there he was making up to \$2  
24 million a year.

25 In August of 1998, Mr. Stitsky was barred by the

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## Sentence

1 Securities and Exchange Commission from association with any  
2 broker-dealer investment company, investment advisory or  
3 municipal securities dealer because of his alleged involvement  
4 with securities fraud associated with Stratton Oakmont.

5 Now having left Stratton Oakmont, he was employed by  
6 Monitor, and at Monitor recruited many of the brokers that  
7 were at Monitor, which was this fraudulent operation. He  
8 recruited them from Stratton Oakmont and from other places  
9 where fraudulent sales practices were used.

10 Then, as I referred earlier, the secret bribes were  
11 paid to the brokers who had been recruited by Mr. Stitsky and  
12 these bribes were calculated on the basis of the total volume  
13 of certain securities purchased and held by those brokers'  
14 retail customers.

15 This case is a very serious case. Mr. Stitsky is one  
16 defendant out of 26 defendants in the case before me, and  
17 there are several other cases in this court involving  
18 approximately the same number of defendants in this massive  
19 securities fraud scheme.

20 The fact is that Mr. Stitsky, as I pointed out, has  
21 pled guilty pursuant to a written plea agreement. This is a  
22 negotiated plea. He pleaded guilty to two counts that I have  
23 referred to. He stipulated in the written plea agreement that  
24 he signed, and Mr. Stitsky is a sophisticated business person,  
25 he stipulated that the improper benefit conferred in return

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## Sentence

1 for the bribes which were paid to the brokers that he  
2 recruited exceeded \$800,000. He further stipulated that this  
3 improper benefit referred to the value of the securities  
4 transactions which were affected in return for the bribes paid  
5 to these brokers and to Mr. Stitsky.

6 Mr. Stitsky, in addition to the fact that he has the  
7 Stratton Oakmont situation and this situation, has also pled  
8 guilty to one count of securities fraud in connection with his  
9 indictment in the Eastern District of New York, in Brooklyn,  
10 and Long Island, and that offense related to a separate  
11 conspiracy to manipulate securities in at least eight  
12 companies for his own benefit in connection with fraudulent  
13 representations made to an Internet company.

14 He also pled guilty in the Eastern District court,  
15 federal court, to charges relating to threatening an  
16 individual with physical injury if that individual attempted  
17 to collect a legitimate business debt from Mr. Stitsky. He  
18 pled guilty to one count of making false statements to the  
19 government when he was subsequently questioned about the  
20 event. In other words, Mr. Stitsky, even though he is in  
21 Criminal History Category I, has a, I will call it, checkered  
22 history. He presents a very sympathetic case for a downward  
23 departure, and specifically he claims that his wife is unfit  
24 to care for his children due to her abuse of alcohol and drugs  
25 and, what is clearly implicit in these papers, her substantial

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## Sentence

1 emotional problems. He says that his family circumstances are  
2 extraordinary and that, given the circumstances that he finds  
3 himself in and his children are in, that the court ought to  
4 downwardly depart from the guidelines, the sentencing  
5 guidelines, which dictate a sentence within a specific  
6 sentence range.

7           The sentencing guidelines make reference to family  
8 ties and responsibilities in Section 5H1.6 as follows. It  
9 states: Family ties and responsibilities and community ties  
10 are not ordinarily relevant in determining whether a sentence  
11 should be outside the applicable guideline range. In fact,  
12 the cases indicate that family circumstances are a discouraged  
13 basis for departure, and the reason is obvious, that  
14 defendants who have families, who have children, who appear  
15 before the court on sentence, are commonly in a situation  
16 where the family is seriously adversely affected by the  
17 removal of a parent from the home. This is a circumstance  
18 that courts and judges deal with every day of the year in  
19 courts throughout the United States. It's a reason why  
20 judges, contrary to what people in the public may believe,  
21 find sentencing so difficult and, in fact, painful.

22           In this case, the defendant has a difficult case to  
23 make because he has four children who are not infants. It's  
24 true that the youngest of the children is 10, but he has  
25 children who are age 20, 18 and 16, children who have already

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## Sentence

1 moved along through their childhood into young adulthood. The  
2 sentencing guidelines indicate that a downward departure  
3 certainly can be granted if the factor that is presented to  
4 the court, in this case extraordinary family circumstances, is  
5 presented to an exceptional degree or in some other way makes  
6 the case different from the ordinary case where the factor is  
7 present.

8           There really has to be exceptional and extraordinary  
9 circumstances. The mere disruption of the defendant's life  
10 and the resulting effect on those who are dependent on the  
11 defendant is in fact, as I indicated, inherent in the  
12 punishment of incarceration for all defendants who appear  
13 before this court, and courts have spent a great deal of time,  
14 districts courts and circuit courts, in analyzing these  
15 circumstances, and the singular question to be addressed is  
16 whether the case is outside the heartland of the cases that  
17 appear before the court.

18           In this case we have a complexion of facts which  
19 indicate the following: The children in Mr. Stitsky's  
20 household are, without doubt, significantly older than those  
21 cases in which downward departures commonly are granted. It  
22 is the experience of this court and other judges of this court  
23 and courts throughout the United States that not uncommonly  
24 single parents, women whose children are going into foster  
25 care, appear before this court and courts viewing these cases

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## Sentence

1 and the volume of them have occasionally downwardly departed  
2 but have looked to the entirety of the circumstances to see  
3 what else the family consists of and what else is available  
4 for the children and who else can be looked to to step in in  
5 the place of the defendant before the court. And parsing  
6 these cases, it is clear to me, again as I indicated a few  
7 moments ago, that under the test of whether this case is  
8 outside the heartland or extraordinary or unique, I don't  
9 think that the defendant can establish that, and I find that  
10 this case is not outside the heartland and, in my discretion,  
11 would decline to downwardly depart and do so for these  
12 reasons.

13 In this case, unlike many other cases, and  
14 notwithstanding my acceptance of what has been stated with  
15 regard to Mr. Stitsky, this defendant, unlike many, many other  
16 defendants, have other family members who are available and  
17 who have stepped in thus far to provide support, emotional and  
18 financial support, to the children while Mr. Stitsky is  
19 incarcerated. In this particular case, as I review the facts  
20 here, it is clear that Mr. Stitsky has two sisters in this  
21 area, in the metropolitan area. He has two parents. He has  
22 Mr. Stitsky's two parents. These people have all been  
23 supportive and the indication is will continue to be in this  
24 tight-knit close family that is before us in the form of  
25 Mr. Stitsky, the father.

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## Sentence

1           Since 1995, Mr. Stitsky's sisters have already  
2 provided over \$80,000 in financial assistance to the family.  
3 Mr. Stitsky's mother and stepfather have provided both  
4 emotional and financial support for the family, as have the  
5 sisters, and they have provided, the mother and stepfather,  
6 more than \$200,000 to support the family. And Mr. Stitsky's  
7 in-laws, the parents of his wife, Mr. and Mrs. Minsky, have  
8 provided a quarter of a million dollars to the family since  
9 1995.

10           I say this not to diminish the arguments made by the  
11 defendant so much as to point out that this case is different  
12 from so many other cases that are before us where a mother or  
13 father, the only person in the home, are about to be sentenced  
14 and don't have anyone out there to step forward and provide  
15 emotional and financial support for children.

16           In this case, as unfortunate and tragic as this case  
17 is, and it is, there are people in the family who have been  
18 and are available to provide emotional and financial support,  
19 and that, in my judgment, is a serious factor that removes  
20 this case from the argument that it is outside the heartland.  
21 It is a case that is not unique. It is in the heartland of  
22 cases. It is a case in which fortunately there are others who  
23 are available to provide the specific items for the children.

24           It is also interesting to me that this situation, in  
25 which the defendant and his wife are divorced, at least since

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## Sentence

1 last March, finds the defendant and his wife living in the  
2 same home with the children. Withdrawn. Finds his wife  
3 continues to live with the children in the same home they  
4 lived in as husband and wife even though they had joint  
5 custody, and that Mr. Stitsky has not yet, at least according  
6 to what I have seen, made any application to a court for sole  
7 custody of the children or at least sought to have his  
8 children live with him rather than his wife despite all these  
9 difficulties his wife is experiencing.

10 This is not to say that I am not sympathetic to the  
11 children. I am very sympathetic to the children, extremely,  
12 and I wish there was a way that I can find a solution to both  
13 sides of the equation that would not impact on the children as  
14 I know this sentence does.

15 Mr. Stitsky and his wife both, it seems to me, have  
16 problems with alcohol and drugs, which itself is a tragedy,  
17 and I think that both of them are in serious need of  
18 treatment. But that doesn't, again, change the facts that I  
19 have indicated, which are that this case is not outside the  
20 heartland of cases. This case is not uncommon. Parents who  
21 are being sentenced commonly come before this court with  
22 severe alcohol and drug abuse problems and the children are  
23 the affected parties.

24 The substance of this is that the court declines in  
25 its discretion to downwardly depart for extraordinary family

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## Sentence

1 circumstances because as serious as I find this case to be,  
2 this case is not outside the heartland of cases and is not to  
3 this court extraordinary.

4 The court also notes that the arguments that have  
5 been made by Mr. Adler, who has done a superb job for the  
6 defendant, by the way, require a response. Mr. Adler points  
7 out that Mr. Stitsky received only \$57,000 as his part of the  
8 payments that were made here. However, the fact is, as I  
9 indicated at the outset, there is a written plea agreement in  
10 this matter, in which it is said by the parties they agree  
11 that the improper benefit conferred in return for the bribes  
12 paid to the brokers that Mr. Stitsky recruited exceeded  
13 \$800,000, and the improper benefit referred to the value of  
14 the securities, referred to the value of the securities  
15 transactions which were effected in return for these bribes.

16 The fact is that Mr. Stitsky has agreed in his plea  
17 agreement not to seek a departure from the stipulated  
18 guidelines range on any grounds but the sole exception of his  
19 family circumstances, which I have now alluded to, and he  
20 further agreed he would not otherwise suggest a departure or  
21 adjustment was warranted. It is in the plea agreement.

22 The fact is under the sentencing guidelines, even if  
23 we accept, and I do accept Mr. Adler's argument that Mr.  
24 Stitsky had a benefit, a financial benefit personally of only  
25 \$57,000 rather than the stipulated amount of 800,000 to a

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## Sentence

1 million and half, under the guidelines, and the defendant's  
2 individual profit is not the measure of the loss, because the  
3 fact is that Mr. Stitsky participated in a conspiracy, in a  
4 jointly undertaken activity that resulted in the stipulated  
5 loss amount of between 800,000 and a million and a half  
6 dollars. For sentencing purposes, under the guidelines, it is  
7 the improper benefit that was conferred in return for the  
8 bribes that is the loss amount that the court uses in  
9 calculating the guidelines. That's the law. That's also what  
10 the parties agreed to, and certainly we are dealing here with  
11 a sophisticated defendant and a very sophisticated and very  
12 experienced lawyer.

13           The net result of which is that I find that the  
14 guideline calculations that were made here in the presentence  
15 report and as stipulated to by the parties is correct and  
16 appropriate and I believe that they are the ones that should  
17 be applied and I do intend to apply them.

18           With all of this in mind, and recognizing that I have  
19 sentenced many defendants now in this 26-defendant case, some  
20 of whom have sentences which are well in excess of the  
21 sentences that are confronting Mr. Stitsky here, in trying to  
22 balance the sentencing considerations, I do now sentence  
23 Mr. Stitsky to the lowest level under the guidelines in this  
24 case and remand him to the custody of the Bureau of Prisons  
25 for a term of 21 months, to be followed by a term of three

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## Sentence

1 years' supervised release. The supervised release is to be  
2 subject to the mandatory conditions that he not commit another  
3 federal state or local crime; that he not illegally possess a  
4 controlled substance; that he not possess a firearm or  
5 destructive device.

6 He is also subject to the standard conditions of  
7 supervision 1 through 13, with the special conditions that he  
8 provide the probation officer with access to any requested  
9 financial information; that he not incur new credit charges or  
10 open additional lines of credit without the approval of the  
11 probation officer unless Mr. Stitsky is in compliance with the  
12 installment payment schedule.

13 He is to participate in a program approved by the  
14 United States Probation Office for substance abuse, which  
15 program may include testing to determine whether Mr. Stitsky  
16 has reverted to the use of drugs or alcohol. Mr. Stitsky will  
17 be required to contribute to the costs of services rendered as  
18 a copayment in an amount to be determined by the probation  
19 officer based on his ability to pay or the availability of  
20 third-party payment. He shall participate in an alcohol  
21 aftercare treatment program under a copayment plan which may  
22 include urine testing at the direction and discretion of the  
23 probation officer.

24 He is to report to the nearest probation office  
25 within 72 hours of his release from custody. His supervision

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## Sentence

1 under the supervised release is to be conducted in the  
2 district of his residence.

3 I am not imposing any fine here because I do not find  
4 that he has the ability to pay a fine and also to pay the  
5 restitution, which will be set on a date to be set 60 days  
6 from now. I do impose, however, the mandatory assessment of  
7 \$200, \$100 on each count, which is due and payable  
8 immediately.

9 I am imposing this sentence in light of the  
10 considerations which are set forth in the law. That is, that  
11 the sentence address the seriousness of the crimes and deters  
12 the defendant and others and to protect the public.

13 There are outstanding counts. Are you requesting  
14 them to be dismissed?

15 MR. MUSOFF: Yes, your Honor.

16 THE COURT: That motion is granted.

17 The defendant has the right to appeal the sentence or  
18 any part thereof. Should he determine to do so, I ask you,  
19 Mr. Adler, if you're available, to assist him on any such  
20 appeal. If you are not available to assist him and he cannot  
21 afford counsel and he wishes to appeal, the court will appoint  
22 counsel to represent him free of charge.

23 In your letter to the court, Mr. Adler, you ask that  
24 the court make a recommendation, if it does sentence  
25 Mr. Stitsky to incarceration, to make a recommendation to the

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Sentence

1 Bureau of Prisons that Mr. Stitsky be permitted to serve his  
2 sentence at the Otisville facility.

3 MR. ADLER: Yes, Judge. I did so because there is a  
4 particular rabbi who I have had some dealings with and I just  
5 want to say that I found that his efforts in terms of dealing  
6 with defendants was proper and useful, and the defendant --

7 THE COURT: I am prepared to make the recommendation.

8 MR. ADLER: Thank you.

9 THE COURT: Particularly because I do want Mr.  
10 Stitsky to be in this area of the country, to be close to his  
11 children and maintain and continue to have contacts with his  
12 children that I think are critical to their needs and  
13 important to Mr. Stitsky's.

14 I will also say if the Bureau of Prisons measures how  
15 many people they have and what their needs are and capacities  
16 are, and they are not bound by the court's recommendation, I  
17 am going to also suggest if they don't have facility for him  
18 in Otisville that he be sentenced to a facility as close to  
19 the metropolitan area as possible where he can maintain  
20 contact with his children.

21 MR. ADLER: I appreciate that, Judge.

22 THE COURT: That is the sentence of the court.

23 Anything further, Mr. Adler?

24 MR. ADLER: I was just going to suggest purely by way  
25 of housekeeping, just looking for round dates, if, pursuant to

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## Sentence

1 Mr. Musoff's information, if the government might be able to  
2 get me some figures by the week of February 25. I didn't know  
3 if the court wanted to select a date of perhaps Monday, March  
4 18, as a target date, on the assumption whatever date Mr.  
5 Musoff selected, the week of February 25, if that was  
6 convenient for him, we can return to address the issue of  
7 restitution.

8 THE COURT: Can we set this down for March 18?

9 MR. MUSOFF: With the convenience of the court and  
10 Mr. Adler, if we can do it the week of March 11.

11 THE COURT: We will get the government to get the  
12 papers by February 25 and we will put it down for March 11.

13 MR. ADLER: Yes, sir.

14 THE COURT: Let's make it March 11. Let's make it 11  
15 o'clock on March 11.

16 MR. ADLER: Thank you, your Honor.

17 THE COURT: Anything further?

18 MR. ADLER: No, sir.

19 MR. MUSOFF: No, your Honor. Thank you.

20 THE COURT: Thank you both.

21 (Adjourned)

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23

24

25

